

***National Labor Relations Board***  
**OFFICE OF THE GENERAL COUNSEL**  
**Advice Memorandum**

**DATE:** November 7, 1995

**TO:** William C. Schaub, Jr., Regional Director, Region 7

**FROM:** Barry J. Kearney, Associate General Counsel, Division of Advice

**SUBJECT:** Cascade Care Center, Case GR-7-CA-37413

177-8520-1600, 177-8520-0800, 177-8520-2400, 177-8520-4700, 177-8580-8050, 177-9762

This Section 8(a)(1) case involving a discharged LPN was submitted for advice as to whether the Employer's charge nurses are Section 2(11) supervisors because they allegedly use independent judgment in assigning, responsibly directing and/or disciplining employees. [\(1\)](#)

**FACTS**

The Employer's nursing home has four wings, each with a charge nurse and two or three aides (CNAs) scheduled on each shift. [\(2\)](#)

Due to a shortage of CNAs, nurses are sometimes assigned to work as aides for their shifts. On weekday shifts, two supervisory nurse managers work at one of the nursing stations covering the four wings, and the Employer's Administrator and DON are also at the facility. On evenings and weekends, one of these management representatives is designated on-call and can be reached by a pager.

Although the current charge nurse job description, dated 1986, states that responsibilities include the Section 2(11) indicia of discipline and evaluations, only one individual remembers receiving a copy, when she was hired in 1989. No one at the Employer's facility has received an evaluation since 1993, and all wage increases are across-the-board. A May 1995 memo to nurses from the Administrator states that charge nurses have the authority to "discipline by means of verbal warnings, written warnings and termination after verifying with the appropriate nurse manager, "DON or Administrator, and that LPNs will be rotated through charge nurse and aide duties. Charge nurses spend most of their time distributing medications, administering treatments ordered by physicians, changing beds and other direct patient care (aide work).

Monthly and daily scheduling for all nurses and CNAs, indicating when they are to work, is done by an office scheduling nurse, who works with the DON. The daily assignment sheet also assigns aides to specific wings, and changes cannot be made without authorization by the DON. [\(3\)](#)

That sheet also arranges aide work assignments within each wing into two groups, and aides apparently can choose an assignment when they arrive. Although the Employer states that charge nurses can assign aides work and change prearranged groups of room assignments, several charge nurses testified that this is done to distribute work equally among aides and to have aides work as frequently as possible with the same residents so that their duties are more routine. There is also evidence that an LPN assigned as a night shift aide refused to accept assignments given her by the LPN charge nurse and left work early but, following a report of the incident by the charge nurse and an investigation by the DON, the charge nurse was forced to resign for allegedly refusing to help the aides on her shift. Moreover, charge nurses cannot authorize an aide from the previous shift to work overtime or call off-duty aides into work without prior authorization from the DON.

When aides engage in such misconduct as insubordination or neglect of duties, charge nurses can record their observations on "Feedback Forms" which, according to the DON, are not considered discipline although some are retained in personnel files as the possible basis for future discipline. There is evidence that the DON told at least one LPN charge nurse not to complete a

feedback form regarding an aide's refusal to obey an instruction because the DON would talk to the aide. Although not widely used or known about by most charge nurses, they can also complete an "Employee Warning Record" which has spaces for remarks and recommendations by the "Supervisor," employee statements and action to be taken. The only such form completed from 1993 through May 1995 was filled out by a charge nurse at the direction of the DON after the DON instructed the charge nurse to complete a feedback form and after the CNA repeated the improper conduct the next night. The DON then talked to the CNA about her conduct, in the presence of the charge nurse, and decided on the discipline to administer. There has been increased use of this warning form by nurses after the Charging Party filed this charge, but a former nurse manager states that the form was not to be used by charge nurses and that all decisions regarding discipline of aides were made only by the DON and nurse managers. The DON stated that while she always talks to charge nurses who fill out the warning form and occasionally receives spontaneous recommendations as to discipline, charge nurses "are not asked for a recommendation, since that decision is up to myself or the nurse managers."

### ACTION

We conclude, in agreement with the Region, that LPN charge nurses like the Charging Party are not statutory supervisors.

After Health Care, <sup>(4)</sup> the General Counsel has taken the positions <sup>(5)</sup> that the Board's interpretation of the phrase "responsibly to direct" properly may distinguish between the authority to direct another to perform specific tasks -- such as that possessed by an employee with specialized expertise to direct other employees on discrete tasks related to that expertise -- and the authority to define the overall job of another. Thus, in the health care context, while the LPN or RN may tell the aide when or how to perform specific tasks such as changing beds, turning patients and tending to the needs of particular patients, such authority is not "responsible direction" without the additional managerial authority, for example, to require the aide to work overtime or to report to work in the event of staff shortages. <sup>(6)</sup>

Further, "assign" must mean something more than directing others to do specific tasks; otherwise it would have been unnecessary for Congress to add the term "direct" to Section 2(11). Rather, the term "assign" should encompass more significant matters, like the initial determination as to where, and on what shift, an employee is to work, or subsequent changes in the employee's shift or work station.

Finally, only if it is found that an individual exercises one or more of the twelve indicia of supervisory status is it necessary to determine whether the exercise was accompanied by independent judgment. The fact that a professional employee, by definition, exercises "discretion and judgment" does not mean that he or she necessarily exercises independent judgment in the 2(11) sense. A professional may be capable of exercising judgment, but nevertheless, by virtue of operating under instructions or routines, may not, in fact, exercise independent judgment in assigning or directing work. <sup>(7)</sup>

We conclude that the Charging Party did not responsibly direct the work of or assign the CNAs and, even if she did, she did not exercise independent judgment in so doing. The initial shift and wing assignments are not made by charge nurses, but rather by the scheduling nurse who works in conjunction with the DON. Further, charge nurses cannot change an aide's wing assignment without authorization from the DON unless they are performing essentially routine transfers to comply with predetermined state staffing levels. Moreover, to the extent that charge nurses make adjustments to aides' duty assignments, there is no evidence that some CNAs possess special skills requiring the charge nurse to differentiate among them in patient or task assignment. Rather, charge nurses only attempt to routinely balance the aides' work load. This does not involve the kind of personnel allocation that constitutes "assigning" employees under Section 2(11), but merely the distribution of routine job tasks to employees already assigned to a wing and shift. Additionally, charge nurses cannot require, but rather may merely request, off-duty CNAs to work overtime or report to work for an absent CNA, and can do this only with prior authorization from the DON or other on-call manager. Therefore, we would argue that such actions do not constitute responsible direction under 2(11) and, even if they do, they do not entail the use of independent judgment.

We further conclude that the Employer's charge nurses do not discipline or effectively recommend discipline of employees. The Board has held that "nurses are not supervisors [if] their warnings, either individually or in the aggregate, do not lead to personnel action; or, if they do, such action is not taken without independent investigation or review by others. Accordingly, their warnings are merely reportorial and not an indicium of supervisory authority." *Northcrest Nursing Home*, 313 NLRB 491, 497, fn. 29 and 30 (1993). Here, there is no evidence that the decisions by charge nurses to complete feedback or warning

forms regarding CNAs result in discipline absent prior review and investigation by the DON and nursing managers. Feedback forms are merely placed in personnel files for possible use in some future disciplinary action. Moreover, both the DON and a former nursing manager have testified that they make all decisions regarding discipline, even if warning forms are completed by charge nurses. Accordingly, feedback and warning forms issued by charge nurses are merely reportorial and are not an indicium of supervisory status.

In sum, the Employer's charge nurses, like the Charging Party, are not Section 2(11) supervisors.

B.J.K.

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<sup>1</sup> The Region has determined that the Employer's charge nurses possess none of the other Section 2(11) indicia, and that the Charging Party's discharge violated Section 8(a)(1) if charge nurses are not supervisors.

<sup>2</sup> Charge nurses are either RNs or LPNs, and one wing also has a treatment or medication nurse on all but the night shifts because of the higher acuity levels of the residents on that wing.

<sup>3</sup> The few instances where night shift nurses transferred aides from one wing to another without prior approval were apparently necessary to maintain minimum staffing levels required by the state.

<sup>4</sup> *NLRB v. Health Care & Retirement Corp.*, \_\_ U.S. \_\_, 114 S.Ct. 1778, 146 LRRM 2321 (1994).

<sup>5</sup> See General Counsel's brief to the Board in Providence Hospital, Cases 19-RC-12866 and 3-RC-10166, filed October 24, 1994.

<sup>6</sup> Though the exercise of such additional authority may amount to "responsible direction," it may or may not involve "independent judgment," depending on how much discretion is left to the LPN or RN.

<sup>7</sup> See, e.g., *Sav-On Drugs*, 243 NLRB 859, 861-862 (1979), *enfd.* 709 F.2d 536 (9th Cir. 1983).